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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Cranial Technologies, Inc.

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Serial No. 75/174,154

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Donald J. Lenkszus, Esq. for Cranial Technologies, Inc.

Fred Mandir, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Simms, Bottorff and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Cranial Technologies, Inc. (applicant) filed an application to register the mark DYNAMIC ORTHOTIC CRANIOPLASTY in typed form for goods and services ultimately identified as “non-invasive cranial orthosis used to reshape cranial defects” in International Class 10 and “medical services, namely, cranial remodeling and shaping utilizing cranial orthosis devices” in

International Class 42. The application (Serial No. 75/174,154) was filed on September 30, 1996, and it claimed a date of first use of April 11, 1990, and a date of first use in commerce of October 31, 1991.

The Examining Attorney initially refused registration on the ground that the mark DYNAMIC ORTHOTIC CRANIOPLASTY was merely descriptive because it "describes a method of correcting skull defects by means of force applied by an orthosis." 15 U.S.C. § 1052(e)(1). First Office Action, p. 2.

Applicant argued that its mark was not merely descriptive, but ultimately amended its application to seek registration under Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f). Applicant's evidence of acquired distinctiveness consisted of an allegation of five years use, advertising expenditures of almost $120,000 over five years,[1] recognition by professionals in the field, and media articles about its goods and services. The Examining Attorney was not persuaded that applicant's mark had acquired distinctiveness, primarily because the Examining Attorney determined that applicant's mark was generic or at

[1] "From December 1993 through December 1997, the applicant has expended approximately $118,428 on advertising its goods and services…. These expenses include advertising ($1170), marketing ($66,262) and other business related expenses ($50,976)." Pomatto declaration dated July 20, 1998, p. 2.

least so highly descriptive that it would not function as a trademark.

When the Examining Attorney made the refusal to register final, applicant filed a notice of appeal. An oral hearing was requested and subsequently held on October 10, 2001.

The Examining Attorney relies primarily on dictionary definitions of the individual terms “dynamic,” “orthotic,” and “cranioplasty” and articles and literature that refer to applicant’s products and services as a “dynamic orthotic cranioplasty.” Applicant points out that these articles and the patent refer to applicant or its employees. In addition, applicant places some of the blame on the generic use of its term in the articles on the editors of medical journals who chose to change the uppercase use of the term to the lower case although applicant admits that it did not designate its term with a “TM.” Applicant’s Br., p. 5.

We agree with the Examining Attorney that applicant’s mark is merely descriptive and that applicant has not submitted sufficient evidence of secondary meaning. Therefore, we affirm the Examining Attorney’s refusal to register applicant’s mark. In the interest of completeness, we also determine that applicant’s mark is

generic for the goods and services identified in the application.

DESCRIPTIVENESS

We now analyze the mark to see if it is merely descriptive, and, if so, whether applicant submitted sufficient evidence of acquired distinctiveness. For a mark to be merely descriptive, it must immediately convey knowledge of the ingredients, qualities, or characteristics of the goods or services. In re Gyulay, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); In re Quik-Print Copy Shops, Inc., 616 F.2d 523, 525, 205 USPQ 505, 507 (CCPA 1980). To be "merely descriptive," a term need only describe a single quality or property of the goods or services. International Nickel Co., 262 F.2d 806, 807, 120 USPQ 293, 294 (CCPA 1959). Descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. In re Abcor Dev. Corp., 588 F.2d 811, 814, 200 USPQ 215, 218 (CCPA 1978).

In this case, the Examining Attorney relied on several dictionary definitions to explain what the terms in the mark mean. We will first explore the meaning of the individual terms and then the mark as a whole, keeping in mind that it is the mark in its entirety that must be

considered in determining whether the mark is descriptive. P.D. Beckwith, Inc. v. Commissioner, 252 U.S. 538, 545-46 (1920). However, "[i]t is perfectly acceptable to separate a compound mark and discuss the implications of each part thereof … provided that the ultimate determination is made on the basis of the mark in its entirety." In re Hester Industries, Inc., 230 USPQ 797, 798 n.5 (TTAB 1986).

The Examining Attorney has made the following definitions of record. First, the term "dynamic" is defined as "pertaining to or manifesting force." *Dorland's Illustrated Medical Dictionary*, (1994), p. 513. Applicant's brochure explains that: "This lightweight cranial headband applies dynamic pressure to the elevated areas." Also, in an article about its goods, the authors explain that: "This orthosis works by applying a directed force to the apices." *Treatment of Positional Phagiocephaly with Dynamic Orthotic Cranioplasty*, p. 151. The same article claims that the band's "dynamic and customized design approach, as well as a specific treatment protocol, have a distinct advantage over passive devices." Id. at 158-59. Another article reports that applicant's device "works by applying a 'dynamic force to the skull to change its shape.'" *Raising Arizona Kids* (June 1998), p. 18. Thus, the term would be, at least, descriptive of a

device, such as applicant's, that applies dynamic pressure to correct a medical problem.

Second, the term "orthotic" is defined as "serving to protect or to restore or improve function; pertaining to the use or application of orthoses." *Dorland's*, p. 1194. "Orthoses" is defined as "an orthopedic appliance or apparatus used to support, align, prevent, or correct deformities or to improve the function of movable parts of the body." Id. Clearly, applicant's goods and services are designed to correct deformities. Applicant's own specimens use the term to explain that its product is a "cranial remodeling orthosis." Applicant's identification of goods and services define the goods as cranial orthosis and the services as using a "cranial orthosis device." There can be little doubt that the term "orthotic" is highly descriptive of applicant's goods and services that involve a device that is used to correct deformities in the skull.

The last term, cranioplasty, is defined as "any plastic operation on the skull; surgical correction of defects of the skull." *Dorland's*, p. 389. Applicant makes much of the fact that the definition of "cranioplasty" refers to a surgical procedure. Applicant's Br., p. 6 ("[A] medical practitioner seeing the term 'cranioplasty'

would typically be lead to associate the term with a surgical procedure"). Typically, that is likely to be true when the term is viewed in a vacuum, but we must look at the term as applied to the goods and services, which are defined as "non-invasive cranial orthoses" and "cranial remodeling and shaping utilizing cranial orthosis device."

Applicant has not provided any basis to find that this generic term suddenly has no descriptive meaning when the same defect is corrected by non-invasive, as opposed to invasive, means. Indeed, the record supports the conclusion that the term would continue to describe applicant's goods and services. Applicant's president as a co-author of an article reports that "[b]etween 1988 and 1993, we employed external cranioplasty in the treatment of 124 infants." *Treatment of Positional Phagiocephaly with Dynamic Orthotic Cranioplasty*, p. 153. An article that applicant submitted, under a picture of a baby wearing its device, contains the following caption: "Eli wears a cranioplasty band 23 hours a day." "[Ba]bies need a helmet," p. 2.[2] Indeed, the term is used to refer to the device used to correct the skull and not just to the surgery itself. *Medical Industry Today*, May 16, 1997 ("A

[2] The newspaper article was submitted without the entire headline.

model of the proposed cranioplasty was hand molded until it accurately fit into the light image"); *Medical Industry Today*, April 15, 1997 ("The molds are made by reversing the CT images on the lightbox. Forming a transparent mirror image, and hand molding the cranioplasty until it fit the image").[3] We simply cannot say that the term "cranioplasty" that is used to describe procedures and materials used to repair the skull would lose all descriptive meaning when it is applied to a skull repair product or service that uses non-invasive means.

Therefore, since the words are individually descriptive, we next turn to the issue of whether the term as a whole describes applicant's products and services. Based on the evidence of record, we conclude that applicant's term is merely descriptive of its goods and services. First, applicant in its patent uses the term in a highly descriptive manner. U.S. Patent No. 5,094,229 ("Experimental results to date indicate that the remodeling band of this invention is capable of performing dynamic orthotic cranioplasty for the effective treatment of plagiocephaly"). Second, applicant's own literature and

[3] The term "cranioplasty" can mean "skull repair" more generally, which is exactly what applicant's goods and services attempt to do. See 21 CFR § 882.4500(a) ("A cranioplasty material forming instrument is a roller used in the preparation and forming of cranioplasty (skull repair) materials").

related articles frequently use the term in highly descriptive ways. *Treatment of Positional Phagiocephaly with Dynamic Orthotic Cranioplasty*, p. 151 ("Infant wearing dynamic orthotic cranioplasty") and note the title of the article. Third, applicant's advertising frequently has a design that consists of the letters DOC™, and underneath these letters, the phrase "Dynamic Orthotic Cranioplasty." This advertising indicates that applicant refers to its goods as DOC and uses the phrase DYNAMIC ORTHOTIC CRANIOPLASTY to describe the goods and services. Fourth, articles apparently co-authored by applicant's president use the term in a non-trademark sense. See, e.g., www.neurosurgery.org/journals (*Etiology of positional plagiocephaly in triplets and treatment using a dynamic orthotic cranioplasty device)*; Journal of Craniofacial Surgery (*Treatment of craniofacial asymmetry with dynamic orthotic cranioplasty*). Also, the term "dynamic cranioplasty" is used to describe a plastic and reconstructive surgery technique for brachycephaly. *Plastic Reconstructive Surgery* (1996).[4] It is clear that the individual words when combined would retain their

[4] Applicant's invention can be used to treat brachycephaly. See "Treatment of Positional Plagiocephaly with Dynamic Orthotic Cranioplasty," p. 151.

descriptive meaning.[5] Applicant's mark, when viewed in relationship to applicant's goods and services, describes an orthotic device or service using dynamic pressure to repair the skull.

Applicant makes several points in arguing that its mark is not descriptive. First, it notes that that many, if not most, of these references are authored by applicant's officers. This fact does not preclude their use in determining whether the term is merely descriptive. See Gyulay, 3 USPQ2d at 1010 ("Appellant argues that it is 'unfair to use appellant's wholesale catalog to determine whether or not the trademark APPLE PIE is descriptive.' We discern no error or inequity in the Board's use of appellant's catalog as evidence of what it contains"). When applicant uses its term to describe its goods and services, it is likely that the public will likewise view the term as merely descriptive.

Second, applicant also has submitted five affidavits from medical professionals. These declarations state in

[5] Applicant argues that some of these lowercase uses were done by editors of medical journals. Applicant's Br., p. 5. However, this does not account for the fact that applicant had in footnote 23 of the article entitled "Treatment of Positional Plagiocephaly with Dynamic Orthotic Cranioplasty" identified the fact that its invention was patented, but it did not indicate that the term was a trademark. In addition, applicant itself has used the term without an indication that the term is a trademark in many of its own advertising materials.

almost the same language that applicant's mark "has no particular meaning in the field of orthotics and craniofacial surgery. 'Dynamic Orthotic Cranioplasty' is not a generic designation for anything. I do not view 'Dynamic Orthotic Cranioplasty[']as being generic or descriptive of anything." It is not clear from these declarations on what basis the declarants came to their conclusion.[6] In one, the declarant states that "'cranial banding' is more generally used as a description of the process of remodeling the head by means of one or another orthoses." McLanahan declaration. Certainly, the fact that there are other words more commonly used to describe applicant's goods and services does not establish that applicant's term is not merely descriptive. We also do not have any basis to find that a mark that is made up of common medical terms that are applied to related goods and services would not be at least descriptive. Applicant

[6] At least three of the declarants (Stephen P. Beals, Edward F. Johanic, and Kim H. Manwaring) are co-authors with the president of applicant of an article entitled "Treatment of Positional Plagiocephaly with Dynamic Orthotic Cranioplasty." The same article also acknowledges in footnote 23 that applicant's patent was "[d]eveloped in conjunction with Stephen P. Beals … and Kim H. Manwaring." In addition, Scott McLanahan along with another doctor is apparently a licensee of applicant. See [Ba]bies need a helmet,' p. 2. Thus, these medical practitioners are associated with applicant's invention and their opinions would not be representative of the average medical professional who did not develop the invention or participate in a study with applicant's president.

itself has used the term in a highly descriptive manner. The fact that applicant has introduced evidence that five medical professionals do not understand the term to be descriptive or generic for anything does not overcome the Examining Attorney's evidence that the term is merely descriptive.

ACQUIRED DISTINCTIVENESS

While we have found that applicant's term is merely descriptive, it would still be registrable on the Principal Register if the applicant demonstrates that the mark has acquired secondary meaning under Section 2(f) of the Trademark Act. Applicant has the burden of proving that its mark has acquired distinctiveness. In re Hollywood Brands, Inc., 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954)("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"). "[L]ogically that standard becomes more difficult as the mark's descriptiveness increases." Yamaha Int'l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988).

Applicant supports its Section 2(f) claim with evidence that shows that "from January 1993 to December 1997, applicant has expended approximately $118,428 in advertising its goods and services" (Pomatto declaration,

p. 2) and it has submitted numerous advertisements and articles about its goods and services. However, we do not find that applicant has met its burden of establishing that its mark has acquired secondary meaning. First, while applicant has shown some de facto evidence of recognition as a trademark, it is also clear that applicant has used the mark descriptively. In several advertisements, applicant has made a point of using a TM symbol after the term DOC and DOC BAND but not after the term DYNAMIC ORTHOTIC CRANIOPLASTY. Several advertisements contain similar language. An example is set out below (emphasis in the original):

> A MESSAGE TO PARENTS OF NEWBORNS
>
> DOC™
> Dynamic Orthotic Cranioplasty
>
> Family members are first to notice when an infant's head "doesn't look right."
>
> The birthing process or positioning cap can cause a baby's head to be misshapen. If it does not correct by 3 months of age, it's important to have an evaluation by a qualified medical specialist.
>
> The **DOC™ BAND** is a non-invasive, gentle means of correction. It is most effective in the period of rapid brain growth – the first year of a child's life.
>
> The 6 oz. Band is custom-designed for each patient. It gently molds the head, using dynamic pressure to elevated areas, and leaving space for the flattened areas to grow into.

Parents reading the above advertisement would likely conclude that the term DYNAMIC ORTHOTIC CRANIOPLASTY describes the product or service they would request to correct a problem with an infant's misshapen skull.

Even among medical professionals, applicant has used its mark in a descriptive manner so that those medical professionals not associated with applicant would not likely view the term as a trademark. Applicant's president is a co-author of an article entitled *Treatment of Positional Phagiocephaly with Dynamic Orthotic Cranioplasty*. The article goes on to describe an "[i]nfant wearing dynamic orthotic cranioplasty" and "[b]etween 1988 and 1993, we employed external cranioplasty in the treatment of 124 infants." *Treatment of Positional Phagiocephaly with Dynamic Orthotic Cranioplasty*, pp. 151 and 153. Medical professionals reading this article would conclude that the term DYNAMIC ORTHOTIC CRANIOPLASTY describes a medical product or procedure. The other medical journals and the patent further support the highly descriptive nature of the mark. Since both patients and medical professionals would be familiar with the term as a descriptive term, applicant's evidence of acquired distinctiveness does not persuade us that the term is now recognized as a trademark. In effect, applicant has

polluted the well with its descriptive use of the term. Its efforts to clean up the mess have not been successful. The fact that five doctors, some of whom are associated in some way with applicant, now say they recognize the term as a trademark is not sufficient to overcome the evidence of descriptiveness and show that the term has acquired secondary meaning. While applicant has advertised its products and services, many of these advertisements simply reinforce the descriptiveness of the mark, and they would not support applicant's claim that its mark has acquired distinctiveness. Therefore, we do find that applicant has meet its burden of demonstrating that the mark has acquired secondary meaning.

GENERICNESS

The Court of Appeals for the Federal Circuit has held that: "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." H. Marvin Ginn Corp. v. Int'l Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Ginn goes on to explain that:

> Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term

> sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id.

Applicant's goods and services are "non-invasive cranial orthosis used to reshape cranial defects" and "medical services, namely, cranial remodeling and shaping utilizing cranial orthosis devices." The first question is, what is the genus of these goods and services. One of applicant's declarants submits that "cranial banding" is a more accepted name of applicant's goods. Applicant's evidence indicates that the goods may be referred to as "cranioplasty bands." Ginn, 228 USPQ at 532 (FIRE CHIEF not the genus of magazines in the field of fire fighting). However, a product may have more than one generic name. Roselux Chemical Co. v. Parsons Ammonia Co., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). Even novel ways of describing products have been held to be generic. Clairol, Inc. v. Roux Distributing Co., 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (HAIR COLOR BATH, novel way of describing liquid for hair coloring, held generic).

The next Ginn question concerns whether the relevant public understand the term to refer primarily to the genus of the goods and services. "[T]o refuse registration on the ground that an applicant seeks to register the generic

name of the goods, the PTO must show that the word or expression inherently has such meaning in ordinary language, or that the public uses it to identify goods of other producers as well." In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). The Office has the burden of showing that the term sought to be registered is generic. In re Central Sprinkler Co., 49 USPQ2d 1194, 1198 (TTAB 1998) (The office has "the burden of proving this refusal with 'clear evidence' of genericness").

The question here is whether the relevant public would refer to applicant's goods and services as "dynamic orthotic cranioplasty." Ginn, 228 USPQ at 532. Combining generic words can result in the combined term also being generic. See In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1017 (Fed. Cir. 1987) (SCREENWIPE generic for a wipe for cleaning television and computer screens); Abcor, supra (GASBADGE at least descriptive for gas monitoring badges; three judges concurred in finding that term was the name of the goods); Cummins Engine v. Continental Motors, 359 F.2d 892, 149 USPQ 559 (CCPA 1966) (TURBODIESEL generic for a type of engine).

Here, we have evidence that a relevant portion of the public will refer to non-invasive cranial orthosis goods

and services as "dynamic orthotic cranioplasty." Id. An article that applicant's president and several of the declarants co-authored is entitled "Etiology of positional plagiocephaly in triplets and treatment using a dynamic orthotic cranioplasty device." www.neurosurgery.org. Applicant's patent states that: "Experimental results to date indicate that the remodeling band of this invention is capable of performing dynamic orthotic cranioplasty for the effective treatment of plagiocephaly." Patent No. 5,094,229, p. 8. Another article by applicant's president and its declarants is entitled "Treatment of Positional Plagiocephaly with Dynamic Orthotic Cranioplasty." *Journal of Craniofacial Surgery*, 1994. In that article (pp. 151 and 152), pictures of infants wearing the device are captioned as follows: "Fig. 1 – Infant wearing dynamic orthotic cranioplasty" and "Fig. 4 – (A) Dynamic orthotic cranioplasty designed to correct parallelogram deformity. (B) Dynamic orthotic cranioplasty designed to treat nicucephaly." Another article uses the term as the name of the goods and services. "Together they developed the headband and called the procedure dynamic orthotic cranioplasty or DOC. *Arizona Republic*, August 24, 1994. The evidence shows that prospective purchasers encountering the term would likely see it as the name of the goods and

services and the public would recognize the term as referring to the genus of the goods and services. Compare In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) (SOCIETY FOR REPRODUCTIVE MEDICINE held not generic for association services because there was no evidence of generic use of the term). Unlike in American Fertility, the evidence in this case supports the conclusion that the term is the name of the goods and services. Applicant's advertising shows that applicant often uses the term "dynamic orthotic cranioplasty" as the name of its goods and services that it provides under the trademark DOC BAND™. See, e.g., Applicant's brochure and applicant's advertisement in *Our Kids*, Oct. 1999, which both contain the phrase DOC™ Dynamic Orthotic Cranioplasty." Applicant's literature also refers to the trademark for the goods and services as the "DOC Band™." Applicant's own use demonstrates that the term "dynamic orthotic cranioplasty" would be used by prospective purchasers as the name of its goods and services. Indeed, it is not clear what other name a potential purchaser would use besides the term "dynamic orthotic cranioplasty" as the name of applicant's goods and services after viewing applicant's advertisement for "DOC™ Dynamic Orthotic

Cranioplasty." The use of applicant's term in this manner is widespread, and not isolated.

While five medical professionals have provided declarations that the term is not the generic name of the goods and services, the persuasiveness of these declarations is undercut by the fact that most of the declarants are co-authors of articles with applicant's president or licensees of applicant. Therefore, we have little evidence that typical purchasers would recognize the term as applicant's trademark. On the other hand, there is significant evidence to demonstrate that the terms have generic meanings in this field and that the articles and advertising evidence shows that the terms are used together in generic fashion. Based on the evidence in the file, we conclude that the term DYNAMIC ORTHOTIC CRANIOPLASTY would be recognized by the relevant public as a generic term to refer to a class of cranial or cranioplasty bands.

CONCLUSION

In summary, after careful consideration of the relevant authorities and the evidence and arguments submitted by applicant, we find that the term applicant seeks to register is merely descriptive of the goods and services recited in the application. Moreover, we find that applicant has failed to submit sufficient evidence of

acquired distinctiveness to warrant registration under Section 2(f) of the Trademark Act. We also determine that applicant's term is generic for the goods and services identified in the application.

Decision: The refusal to register is affirmed.